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# VIRGINIA LAW REGISTER

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All Communications should be addressed to the PUBLISHERS

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It is with deep regret mingled with pride that we announce that our Associate Editor, T. B. Benson, has laid aside the pen he has used with such marked ability, to take up the sword.

**Our Former Associate Editor**

**T. B. Benson.**

Feeling impelled by a high sense of patriotism to offer his services to his country Mr. Benson has resigned his position and entered into the Officers' Reserve Corps at Fort Myer. He will be missed by our readers and sorely missed by his associates who relied much upon his legal ability and his power to express his views upon legal subjects. He took the greatest pride in the REGISTER and whilst writing only a few Editorials—easily identified by his initials—he wrote numerous Leading Articles and no matter what he wrote showed capacity of high order.

His work on "The Virginia Prohibition Act" is one which has attracted much attention and proved of great value to the profession.

While regretting that his work upon legal subjects is suspended—we trust only for a brief while—we earnestly hope that in his new career he may earn the plaudits of his countrymen and serve his country with zeal, gallantry and success. May he return with well-earned laurels and laying down a victorious sword resume the pen he knows so well how to use.

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The decision of the Supreme Court of the United States in four several cases—United States *v.* Gradwell and Hambly and O'Toole, (2 cases), 37 Sup. Ct. Rep. 407, decided April 9th, 1917, is interesting not only for novelty but for recalling for a moment the old Force bills and bills of that character which remained upon the statute books for the amazingly long period of

**Application of Federal Laws to State Primary Elections.**

twenty-four years. The Court merely alludes to these Acts as showing that in the one hundred and twenty-eight years of our government's existence, there have been only twenty-four years in which Congress has attempted to regulate the election of congressmen.

Gradwell and Hambly's cases were for a conspiracy to defraud the United States by corrupting and debauching by bribing certain voters in a general election in Rhode Island for congressmen. O'Toole cases were for "importing voters" in a state-wide primary election for candidates for the United States Senate belonging to the Republican party in the State of West Virginia. The Court through Mr. Justice Clarke enters into a very interesting historical statement of the undoubted exercise of federal control over elections for congressmen and senators and expresses no doubt as to the right of Congress to enact legislation to secure honest and fair elections of members of the Congress of the United States, but concludes that there is no legislation now upon the statute books authorizing federal interference with these elections.

Justice Clarke says:

"The power of Congress to deal with the election of Senators and Representatives is derived from § 4, article 1, of the Constitution of the United States, providing that:

'The times, places and manner of holding elections for Senators and Representatives shall be prescribed in each state by the legislature thereof; but the Congress may at any time by law, make or alter such regulations, except as to the places of choosing Senators.'

"Whatever doubt may at one time have existed as to the extent of the power which Congress may exercise under this constitutional sanction in the prescribing of regulations for the conduct of elections for Representatives in Congress, or in adopting regulations which states have prescribed for that purpose, has been settled by repeated decisions of this court, in *Ex parte Siebold*, 100 U. S. 371, 391, 25 L. Ed. 717, 724 (1879); *Ex parte Clark*, 100 U. S. 399, 25 L. Ed. 715 (1879); *Ex parte Yarbrough*, 110 U. S. 651, 28 L. Ed. 274, 4 Sup. Ct. Rep. 152 (1884); and in *United States v. Mosley*, 238 U. S. 383, 59 L. Ed. 1355, 35 Sup. Ct. Rep. 904 (1915).

"Although Congress has had this power of regulating the conduct of congressional elections from the organization of the government, our legislative history upon the subject shows that except for about twenty-four of the one hundred and twenty-eight years since the government was organized, it has been its policy to leave such regulations almost entirely to the states, whose representatives Congressmen are.. For more than fifty years no congressional action whatever was taken on the subject until 1842, when a law was enacted requiring that Representatives be elected by districts (5 Stat. at L. p. 491, chap. 47), thus doing away with the practice which had prevailed in some states of electing on a single state ticket all of the members of Congress to which the state was entitled."

The justice then takes up the laws of 1870-1872, now repealed, and draws the conclusion that it is the policy of our legislators to leave the conduct of the election of members of the Congress to state laws administered by state officers and that the clauses of the federal law, unnecessary to quote here, had no application.

O'Toole cases concerned as we have said a primary election for candidates of the Republican party for United States Senators in West Virginia, where voters were imported and repeated their votes. It was claimed that § 19 punishing the conspiracy of two or more persons for the purpose of oppressing or injuring, threatening or intimidating "any citizen in the free exercise of any right or privilege secured to him by the Constitution or laws of the United States" applied to these cases. But the Court holds that this section does not and says:

"The claim that such a nominating primary, as distinguished from a final election, is included within the provision of the Constitution of the United States, applicable to the election of Senators and Representatives, is by no means indisputable. Many state supreme courts have held that similar provisions of state Constitutions relating to elections do not include a nominating primary. *Ledgerwood v. Pitts*, 122 Tenn. 570, 125 S. W. 1036; *Montgomery v. Chelf*, 118 Ky. 766, 82 S. W. 388; *State ex rel. Von Stade v. Taylor*, 220 Mo. 619, 119 S. W. 373; *State ex rel. Zent v. Nichols*, 50 Wash. 508, 97 Pac. 728; *Gray v. Seitz*, 162 Ind. 1, 69 N.

E. 456; *State ex rel. Nordin v. Erickson*, 119 Minn. 152, 137 N. W. 385.

"But even if it be admitted that, in general, a primary should be treated as an election within the meaning of the Constitution, which we need not and do not decide, such admission would not be of value in determining the case before us, because of some strikingly unusual features of the West Virginia law under which the primary was held, out of which this prosecution grows. By its terms this law provided that only candidates for Congress belonging to a political party which polled 3 per cent of the vote of the entire state at the last preceding general election could be voted for at this primary, and thereby, it is said at the bar, only Democratic and Republican candidates could be and were voted for, while candidates of the Prohibition and Socialist parties were excluded, as were also independent voters who declined to make oath that they were 'regular and qualified members and voters' of one of the greater parties. Even more notable is the provision of the law that, after the nominating primary, candidates, even persons who have failed at the primary, may be nominated by certificate signed by not less than 5 per cent of the entire vote polled at the last preceding election. Acts West Va. 1915, chap. 26, pp. 222, 246.

"Such provisions as these, adapted though they may be to the selection of party candidates for office, obviously could not be lawfully applied to a final election at which officers are chosen, and it cannot reasonably be said that rights which candidates for the nomination for Senator of the United States may have in such a primary under such a law are derived from the Constitution and laws of the United States. They are derived wholly from the state law, and nothing of the kind can be found in any Federal statute. Even when Congress assumed, as we have seen, to provide an elaborate system of supervision over congressional elections, no action was taken looking to the regulation of nominating caucuses or conventions, which were the nominating agencies in use at the time such laws were enacted.

"What power Congress would have to make regulations for nominating primaries, or to alter such regulations when made by a state, we need not inquire. It is sufficient to say that as yet it has shown no disposition to assume control of such primaries or to participate in them in any way, and that it is not for the courts, in the absence of such legislation, to attempt to supply it by stretching old statutes to

new uses, to which they are not adapted and for which they were not intended. In this case, as in the others, we conclude that the section of the Criminal Code relied upon, originally enacted for the protection of the civil rights of the then lately enfranchised negro, cannot be extended so as to make it an agency for enforcing a state primary law, such as this one of West Virginia."

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Some years ago the American Bar Association caused Mr. Frank C. Smith to make a general examination of the digests for three months to determine what proportion of the reported cases related to matters of procedure. Mr. **Reform in Pleading and Simplification of Judicial Procedure.** Smith's report indicated that more than one-half of the reported cases had in them questions of procedure.

It is interesting and instructive to examine this list; but we are frank to say that taking it upon a percentage basis, the states under the Common Law system compare very favorably with those under Code Procedure. There are now only seven states in the Union which hold under the Common Law system "mortified," as an old Common Law pleader used to say, by statute. These are Florida, Illinois, Maryland, Michigan, Mississippi, Virginia and West Virginia. The percentage of those seven states as to cases ruling on points of practice as against points of substantial law amount to 55.3 per cent. In other words, out of all of the cases which went up to the Supreme Courts of those states over fifty per cent of them ruled on questions of procedure. In all the other states of the Union the percentage amounted to 53.8. In the Federal Courts the percentage was 49.8. So it does not appear that the "Code States" have very much advantage over those under the Common Law.

In Virginia 58 cases were decided in the three months digested. The total points decided were 244. Out of these 107 were on points of substantive law, 137 on points of practice. In West Virginia 72 cases were digested—containing 166 points on substantive law, 176 points of practice.

In New York 888 cases were digested containing 2835 points,

of which 1382 were on substantive law, 1453 on practice. Kentucky had the proud eminence of having the least number of points of practice, her cases being 229, containing 830 points, of which 467 were on substantive law, 363 on practice, making her percentage 43.7. Delaware had the "bad eminence" of leading the procession with 24 cases, 118 points, 42 on substantive law and 76 on practice. Florida came next: 63 cases, 261 points—104 on substantive law, 157 on practice. She holds on to the Common Law; Delaware is a "Code" state.

Every "Common Law" state had a percentage of over 50. No "Code" state fell under 50 except Idaho, 44 per cent; Kentucky 43.7 and Tennessee 45.7.

We do not think from this showing that the superiority of Code practice over Common Law practice is demonstrated to any great extent. It is true this calculation was made in 1910 and only for the months of January, February and March; but those months are generally the ones in which the courts are at their busiest.

It is a lamentable thing, however, to feel how much time, talent and money is wasted over the "steps and entrance hall" to the Palace of Justice. Surely substantial right ought not to be so difficult a thing to present to final arbitrament.

A bill is now before Congress to give the Supreme Court of the United States power to prescribe forms and rules on the Common Law side of the Federal Courts, as power has heretofore been given them and exercised in equity. This bill is as follows:

"A bill to authorize the Supreme Court to prescribe forms and rules, and generally to regulate pleading, procedure, and practice on the common-law side of the federal courts.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that the Supreme Court shall have the power to prescribe, from time to time and in any manner, the forms of writs and all other process; the mode and manner of framing and filing proceedings and pleadings; of giving notice and serving writs and process of all kinds; of taking and obtaining evidence; drawing up, entering, and enrolling orders; and generally to regulate and prescribe by rule the forms for and the kind and character of the entire

pleading, practice, and procedure to be used in all actions, motions, and proceedings at law of whatever nature by the district courts of the United States and the courts of the District of Columbia. That in prescribing such rules the Supreme Court shall have regard to the simplification of the system of pleading, practice, and procedure in said courts, so as to promote the speedy determination of litigation on the merits.

“Sec. 2. That when and as the rules of court herein authorized shall be promulgated, all laws in conflict therewith shall be and become of no further force and effect.”

The report of the Judiciary Committee of the Senate on this bill is interesting. It says in part:

“The purpose and effect of this bill is to give to the Supreme Court of the United States the authority to make rules governing the entire procedure in cases at law to the same extent that it now has power to regulate the procedure in equity and admiralty.

“The system of procedure which now prevails in the federal courts is complicated, unscientific, and results in great and unnecessary delay in the administration of justice. It is almost as important that litigation in the courts shall be disposed of promptly as that it shall be disposed of justly. That cases should be delayed month after month, and sometimes year after year, should be reversed and tried and retried, upon mere matters of practice that in no way touch the essential merits, is one of the reproaches in the administration of the law which has had a greater tendency to bring the practice of the courts into disrepute than any other thing.

“The law which now regulates the practice in the trial courts of the United States in law causes is that embodied in section 914 of the Revised Statutes of the United States, which reads as follows:

“Sec. 914. (Practice and Proceedings in Other Than Equity and Admiralty Causes.) The practice, pleadings, and forms and modes of proceeding in civil causes other than equity and admiralty causes in the circuit and district courts shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the State within which such circuit or district courts are held, any rule of court to the contrary notwithstanding.”

\* \* \* \* \*

“An examination of the law reports discloses that the

time of the trial judges as well as the appellate tribunals has been very largely taken up not in deciding the case but in endeavoring to ascertain the *way to be followed* in order to reach the point where a decision can be made at all. The result is that valuable time is unnecessarily consumed, and there is a great waste of intellectual force in matters which do not in any manner contribute to the ultimate wisdom or justice of the decision. It is, perhaps, not far from the fact to say that in the aggregate one-fourth of the time of the courts of the country is taken up not in the discharge of their substantive duties but in determining the way in which these duties shall be performed. More than one-third of the matter in the annual digests relates to matters of practice and procedure.

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"It is an anomaly to intrust a tribunal with grave and responsible duties and deny it the power to determine the manner in which these duties shall be discharged. The Senate would not for one moment tolerate the idea of having some outside body determine the way in which it shall do its business. Each house of Congress and every legislative body in the country makes its own rules of procedure. The same is true of substantially every administrative body, state and federal. Congress is constantly passing laws to be executed by one of the executive departments and providing that the head of the department shall make such rules and regulations as may be necessary to carry the law into operation. The courts seem to stand almost alone in this respect. These great tribunals intrusted with the delicate and responsible duty of interpreting and administering the law are certainly qualified to determine the mode and manner which shall be best calculated to enable them to discharge their responsibilities surely and promptly.

"Legislation by which the practice and procedure of courts has been regulated for so many years has proven a dismal failure. Nearly 70 years ago it was thought the whole problem had been solved for the state of New York by the adoption of the Field Code of Procedure. This Code as originally drafted was an admirable simplification of the law of procedure and pleading, but successive legislatures have so extended and amplified the original provisions that it has become a bewildering tangle, more obstructive than helpful. Thousands of judicial decisions have been rendered in an attempt to interpret its terms and these decisions are still continuing. In the three months of January, February, and March, 1910, as will be seen by the table hereinbefore

printed, out of the 2,835 points decided by the New York courts, 1,453 of them related to matters of practice.

"The problem of simplifying judicial procedure has not been solved by the codes, but on the contrary, it has been complicated. The delay and failure of justice incident to a situation of the same character induced Great Britain as early as 1873 to adopt the Reformed Procedure. By acts of Parliament passed in 1873 and 1875, and subsequent amendments, the whole authority of making detailed rules of practice, procedure, and pleading was devolved upon the courts, with the result that the English practice has been wonderfully simplified and the courts are rarely called upon to elucidate points of practice."

In our own judgment the matter in Virginia, at least, is now under the Act of Assembly approved Session Acts 1914, p. 641, in the hands of the Court and needs only a firm, fearless and unhesitating application of that Act, which is as follows: "That in any suit or action hereafter instituted, the court may at any time, in furtherance of justice, upon such terms as may be just, permit any proceeding or pleading to be amended, or material supplemental matter to be set forth in an amended or supplemental pleading. The court, at every stage of the proceeding, must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

Our judges under this Act can do as the English judges do, i. e., have the pleadings corrected at the Bar if need be to fit the right and justice of the case and go on with the trial. The writer, when a young lawyer once had a declaration demurred to by one of the most technical and shrewdest lawyers in the State. As soon as the point, which was an absolutely immaterial one as far as the right and justice of the case was concerned, was mentioned we saw that the demurrer had to be sustained. The judge saw it too and before we could rise to attempt to argue the point, said abruptly, "The demurrer is sustained: Now young man sit down there and write in that declaration what Mr. W. wants and then go on with the case." "Am I not entitled to a continuance your Honor?" said Mr. W. "Probably," replied the judge, "but you are not going to get it; call the jury." "No necessity for that Sir," replied Mr. W. "I have no defense to the action other than the demurrer." Was not this right and

why can it not be done in ninety-nine out of a hundred cases without imperilling a single right?

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It is to be deeply regretted that the Legislative Committee to whom bills are referred should not call in some one trained in the use of legal language to simplify as

**Careless Legislation.** much as possible the wording of statutes  
**The State Inheritance Tax.** proposed to be passed.

There seems to be an idea in the mind of the average legislator that simple, plain "unadorned" language, so to speak, is unworthy of the law-maker. The multiplication of words without wisdom we are taught by no less a person than the inspired author of Job "darken counsel." We have an evidence of this in the statute regarding the tax on inheritance. Session Acts 1916, p. 812.

"SECTION 44 (A). TAX ON INHERITANCE.—Where any estate in the Commonwealth of any decedent shall pass under a will or under the laws regulating descents and distributions, to any person, or to or for the use of any person, the estate so passing shall be subject to a tax at the rate of five per centum on every hundred dollars value thereof; provided, that estates passing to or for the use of the grandfather, grandmother, father, mother, husband, wife, brother, sister or lineal descendant of such decedent shall be subject to a tax of one per centum on every hundred dollars value thereof in excess of fifteen thousand dollars and provided further that such tax shall not be imposed upon any property bequeathed or devised where such bequest or devise is exclusively for state, county, municipal, benevolent, charitable, educational or religious purposes. The foregoing rates are for convenience termed the primary rates. When the amount of the market value of such property or interest exceeds fifteen thousand dollars, the rate of tax upon such excess shall be as follows:" etc., etc.

At the first glance there seems to be no difficulty in regard to the construction until one begins to ask why the word *interest* was inserted in the act, and it casts a very serious doubt as to the meaning; so much so that several lawyers of our acquaint-

tance, of no mean ability, have urged that a suit should be brought to have the law construed. The reason of the doubt in the construction of the statute can best be given by an example: A man dies worth one hundred thousand dollars; he leaves ten children; the interest of each child in his estate is ten thousand dollars. Now, what is the inheritance tax upon this estate. If the statute had merely said, "when the amount of the market value of such property exceeds fifteen thousand dollars" the meaning would have been absolutely clear, but when it says *interest*, after the word *property*, what does this mean? Does it mean that the interest of each person in the estate is to be taxed if in excess of fifteen thousand dollars, and, if not, what does it mean? Legislators must be presumed to have meant something, when a word is introduced in a statute, and when it says "such property or interest," what is its meaning? Must the whole property be taxed, if in excess of fifteen thousand dollars, or must the interest of each party entitled to the estate, if in excess of fifteen thousand dollars, be taxed? We believe it was the intention of the Legislature to tax the whole estate in excess of fifteen thousand dollars, but certainly the matter is not free of doubt.